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373-374—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 845

WOODROW YOKUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2–6) is reported at 417 F. 2d 253.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1969. The petition for a writ of certiorari was filed on November 14, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a motion to suppress evidence seized under a search warrant was properly denied.

2. Whether petitioner was prejudiced by publicity given to his case.

3. Whether the evidence was sufficient to support a verdict of guilty.

4. Whether the court adequately instructed the jury.

5. Whether admission of a xeroxed copy of a letter from petitioner to his supervisor was proper.

STATEMENT

After a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was found guilty on six counts of interstate transportation of stolen motor vehicles in violation of 18 U.S.C. 2312, three counts of unlawful sale of property stolen from the United States, in violation of 18 U.S.C. 641, and one count of interstate transportation of property (one thousand pairs of binoculars) obtained from the United States by fraud, in violation of 18 U.S.C. 2314. Petitioner was sentenced to concurrent three year terms of imprisonment on the six counts charging violation of 18 U.S.C. 2312 and concurrent four year terms on the remaining counts. It was further provided that petitioner would be eligible for parole at such time as determined by the board of parole, pursuant to 18 U.S.C. 4208(a)(2). (Pet. App. 21). The court of appeals affirmed as to all counts except Count 3 (Pet. App. 2–6).[1]

[1] Count 3 charged unlawful sale of property belonging to the United States in violation of 18 U.S.C. 641. The court of appeals found that the property dealt with in this count (a dump truck) did not belong to the United States at the time it was sold (Pet. App. 5–6).

Petitioner was employed as a highway supervisor by the State Road Commission of West Virginia. His primary responsibility was to procure, for the use of his employer, surplus federal property. The approved procedure for acquiring this property was as follows: When a federal agency had surplus property, it submitted to the General Services Administration a form indicating the description of the property and its location (Tr. 213, 214, 228, 249). The GSA then made a list of this property available to all federal agencies and appropriate state agencies. Under the Federal Highway Act, some of this property was available to the State Road Commission of West Virginia for use on the state highway system (Tr. 161) through the West Virginia Bureau of Public Roads. (Petitioner testified that to order this equipment he would send a letter to the Bureau of P... ...ting the Bureau to order t... Road Commission (Tr. ... eligible for such equi... prove the request. Th... then present the a... item was available ... cerning priority, t... Bureau's request (Tr. ... Commission picked up ... acquisition form would ... Public Roads by the Commi... then bill the state for the pro... Commission would not be billed ... the form was sent to the Bureau by ... Commission

By failing to send a copy of the acquisition form to the Bureau of Public Roads, petitioner avoided having West Virginia billed for the items obtained. The Bureau would not have any records on these items because petitioner did not order the equipment through the Bureau as required. Petitioner would order the property on the standard form, listing the ordering agency as "the U.S. Bureau of Public Roads," P.O. Box 410, Buckhannon, West Virginia, for shipment to the State Road Commission of West Virginia (Tr. 162, Govt. Exh. 5, Pet. App. 23). There was no such federal agency, and the address given was the address of the Equipment Division of the State Road Commission to which petitioner was assigned (Tr. 141, 146). If the property was available, petitioner would either pick it up himself (Tr. 113, 1156–58, Govt. Exh. 43) or have someone else accept delivery and bring the vehicle into West Virginia (Tr. 588–591).

Petitioner sold two of the vehicles thus obtained—*i.e.*, a Chrysler (Govt. Exh. 1) and a fire truck (Tr. 680–681, Govt. Exh. 47). The purchaser made the checks for these vehicles payable to petitioner. Two other automobiles were titled in petitioner's name (Govt. Exhs. 38, 39) and a third was titled in the name of petitioner's wife's first cousin (Govt. Exh. 40). One thousand pairs of binoculars, valued at $165,000, improperly obtained in Pennsylvania from the federal government, were moved at petitioner's direction to a farm in West Virginia belonging to one of petitioner's relatives (Tr. 318–319). The

Bureau of Public Roads at Hagerstown, Maryland, and the State Road Commission had no record concerning these binoculars (Tr. 424).

ARGUMENT

1. On January 19, 1967, after the commencement of the investigation regarding petitioner's procurement of the vehicles and other items, an FBI agent visited the farm belonging to Oren Yokum, one of the petitioner's relatives. He requested and received from Mrs. Oren Yokum permission to examine the exterior of the trailer-van (Tr. 334). Examination revealed that the trailer-van was painted Marine Corps green and had a Navy identification plate and a Navy serial number (Tr. 335). On February 10, 1967, this agent executed an affidavit for a search warrant, detailing the above facts, and concluding that the agent knew of no government record reflecting the lawful release of the trailer by the government (Court Exh. 1). The affidavit and the warrant specifically described the trailer but did not describe the property inside the van. These documents stated that both the trailer and the property contained therein had been stolen from the United States Government. A subsequent search of the van revealed that it contained the one thousand pairs of binoculars.

Petitioner's contention that the search was invalid because the binoculars were not particularly described in the warrant is erroneous. The warrant did not have to describe the property contained in the trailer because the trailer itself was stolen and was properly

subject to seizure. Since the agents had the right to seize the trailer, they had the right to search its interior. Cf. *Cooper* v. *California,* 386 U.S. 58. Having found one thousand pairs of binoculars in the course of a search of this government vehicle the agents were not required to return to the Commissioner to get another warrant describing the binoculars or, in the alternative, to dump the binoculars on the ground before they removed the trailer. The binoculars were evidence of another crime found in a stolen government vehicle; they were thus properly subject to seizure. See *Abel* v. *United States,* 362 U.S. 217, 238; *Seymour* v. *United States,* 369 F. 2d 825 (C.A. 10); *Johnson* v. *United States,* 293 F. 2d 539 (C.A.D.C.), certiorari denied, 375 U.S. 888.

Petitioner's reliance on *Chimel* v. *United States,* 395 U.S. 752 is misplaced. The Court in *Chimel* was concerned with the scope of a search incident to arrest and not with the search of a vehicle under a search warrant.

2. Petitioner was not prejudiced by the publicity surrounding his arrest and trial. Each case involving adverse publicity must turn on its own special facts. *Marshall* v. *United States,* 360 U.S. 310. Here the newspaper articles, which are on file with the Clerk of this Court, do not reflect the type of permeating and vindictive coverage which this Court condemned in *Sheppard* v. *Maxwell,* 384 U.S. 333. These articles reflect no more than ordinary coverage of a newsworthy event.

Petitioner did not request a continuance or a change of venue because of the alleged adverse publicity. Nor

does a careful reading of the record support the contention that the trial judge refused to instruct the jury to disregard these articles in spite of repeated requests for such instructions by defense counsel. The only request that could be found was the objection to the court's failure to give such an instruction in its charge. The court refused the instruction, stating that the problem had already been covered by other instructions that the jury was to consider only legal evidence—that is, evidence adduced at the trial—and that the jury was not to be swayed by public opinion (Tr. 1450, 1458).

Indeed, the trial judge indicated his sensitivity to the problem of publicity during his *voir dire* examination of the jurors when he inquired if any of the publicity concerning the case would affect their opinion as to petitioner's guilt or innocence (Tr. 27). When one juror indicated that because of the publicity he had formed an opinion, he was examined in detail concerning his opinion and was ultimately dismissed (Tr. 27–31). In addition, during the trial the judge repeatedly admonished the jury to remain aloof from all outside influences relating to the trial (Tr. 94, 223, 401, 593–594, 662, 729–730, 784, 952, and 1344). The trial judge specifically told them not to read news accounts of the trial when he said:

> Perhaps it would be well to mention that you abstain from the reading of newspaper accounts or any news accounts on radio or television reports of this trial because your decisions in this matter have to be based solely on what occurs in the courtroom and it has to be on the evi-

> dence submitted to you in court as I will talk to you about in my instructions and from no other source, and that is why it is so important that you remain aloof from any influences or anything that would lead to a judgment either consciously or subconsciously . . . [Tr. 785.]

This warning by the court adequately protected petitioner from any prejudice due to the media reports on the trial.

3. Considered in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), the evidence was sufficient to sustain a verdict of guilty (see Statement, *supra*, p. 2). Petitioner appears to contend that he could not be guilty because the GSA passed title to the equipment to him. However, the government's evidence showed that title to the property could only be released when authorized by the Bureau of Public Roads (Tr. 169), and petitioner does not allege that he had such an authorization. Petitioner does not contend that he did not order the equipment or that he did not cause it to be transported across state lines. Finally, the jury was instructed that the government had to prove the value of the stolen vehicles was over $100 (Pet. App. 35).

4. The court instructed the jury, *inter alia*, that:

> A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely

> and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.
>
> A reasonable doubt exists in any case when after careful and impartial consideration of all of the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge. [Pet. App. 24–25.]

The court adequately instructed the jury on reasonable doubt; it was not required—as petitioner contends—to instruct that where the government's evidence is circumstantial it must exclude every reasonable hypothesis other than that of guilt. See *Holland* v. *United States*, 348 U.S. 121, 139–140. In any event, the court did instruct that:

> As a general rule, the law makes no distinction between direct and circumstantial evidence, but requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case. [Pet. App. 25.]

5. The admission of the copy of a letter from petitioner to his supervisor, Elmer West, was not error. The letter was on State Road Commission stationery and the petitioner's name and title were typed on the second page (Govt. Exh. 68). Mr. West identified the letter as a copy of the one petitioner had given to him (Tr. 1335) in response to his request that petitioner clarify, in writing, the procedure used in acquiring surplus federal property (Tr. 1334–1335). The absence of the original letter was accounted for when West stated that he did not know where the original was located (Tr. 1335).

Petitioner, when confronted with the letter, denied having written it but testified that some of the statements in the letter were correct (Tr. 1198–1200). The letter was identified and the absence of the original explained. Therefore, it was properly left for the jury to determine the weight and credibility to be accorded the letter.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1970.